

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES BARTLETT)	
Claimant)	
)	
VS.)	
)	
LAFORGE & BUDD CONSTRUCTION CO.)	
Respondent)	Docket No. 1,020,295
)	
AND)	
)	
ZURICH INSURANCE GROUP)	
Insurance Carrier)	

ORDER

Claimant requests review of the August 15, 2005, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) found that claimant did not suffer an injury on the claimed date of accident; that claimant did not give respondent timely notice of the alleged injury pursuant to K.S.A. 44-520; and that respondent did file an accident report within 28 days after it had knowledge of the alleged work accident, so the time limit for written claim was not extended and claimant's written claim was not timely pursuant to K.S.A. 44-520a.

The claimant contends the ALJ exceeded his jurisdiction in denying the relief requested by claimant. Claimant asserts the evidence shows he did injure himself in a work related accident on December 29, 2003; that he timely notified respondent of the accident; and that respondent thereafter failed to file an accident report within 28 days, which extended his time to file a written claim for compensation to one year after the accident.

Respondent argues claimant did not meet his burden of proof that he sustained personal injury by accident arising out of and in the course of his employment on December 29, 2003. Respondent denies claimant's assertion that he advised respondent

of the accident the next day and claims it had no notice of claimant's alleged injury until July 2004, more than 200 days after the date of the alleged accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant testified he injured his back midday on December 29, 2003, while he was working for respondent setting air lines in the bottom of a sewage pond at a waste water treatment plant. Claimant stated he was holding onto a piece of pipe which was being moved in the bucket of a trackhoe when the pipe rocked forward and claimant went flying backwards about 20 feet, landing on his back. Claimant did not report the accident to the foreman at the job site, Chuck Owen, because he thought the foreman had seen the accident. Claimant also did not report the accident to the project superintendent, Francis Emery, because he was not around when the accident happened. Claimant testified that after the accident, he continued to work but the pain started getting worse and he left work early. Claimant states he returned to work the next day and told Mr. Emery about the accident and also told Mr. Emery he was not going to file a workers compensation claim. Claimant said Mr. Emery told him that if his pain got worse, claimant could take layoff. Claimant testified he worked about ten days and then took Mr. Emery up on his offer to take layoff. After he was laid off, claimant began collecting unemployment compensation. Claimant went to a doctor in February 2004 about his back pain but did not tell the doctor about his work-related accident.

Robert Folk testified he operated a trackhoe for respondent on the waste water treatment plant project. He saw an incident where claimant was knocked backwards by a pipe, although he stated claimant was only thrown backwards about five or six feet. When asked if claimant had taken off work the rest of the day after the accident, he stated he could not remember but it seemed like claimant was not present that afternoon. He could not remember the date the incident occurred but remembered that Mr. Owen was present at the time. Mr. Owen did not testify.

Claimant called as witnesses his brother, Richard Bartlett, and Marty Lord. Both testified that a week to a week and a half after claimant's accident, they were at claimant's home playing pool, and Mr. Emery was present. Both testified that claimant and Mr. Emery talked about claimant's accident at that time.

Mr. Emery testified and adamantly denied claimant told him he had been injured in a work-related accident on December 29, 2003, either the next day or any time until July 2004. He testified that if he had been told, he would have filled out a report and would have taken claimant to the Fort Scott Hospital to be looked at by a doctor. Also, respondent's policy was for employees to have a urinalysis after any work-related accident, and claimant would have been advised of this policy when he was hired. Mr. Emery

testified that he had been to claimant's house a few times, but not in late December 2003 or early January 2004. He had never played pool at claimant's house and never talked to claimant about a work-related accident while at claimant's house.

Mitch Brooker testified that he was working on the crew with claimant on December 29, 2003. He testified he would have been in close proximity to the claimant, and testified he had no knowledge of claimant being hurt at the job site and that if it had happened, it would have been put in a written report.

The medical records entered as exhibits show that claimant had complained of low back pain in July 2003. The only time his work-related accident is mentioned in the medical reports is in the June 14, 2004, report of Dr. Cherylon Yarosh. That report also states that claimant has had back pain for many years and does not state that claimant's current problems were caused by the work-related accident.

The written claim for compensation signed by claimant is dated July 18, 2004, more than 200 days after the accident. The respondent's receipt of the written claim shows it was received by it on July 21, 2004. Respondent filed a report of accident with the Workers Compensation Division, which was received by the Division on August 11, 2004.

The ALJ found that claimant's version of events was not credible. The ALJ noted that claimant did not seek medical treatment until February 2004 and then did not tell the doctor about a work injury. Also, the ALJ found that it would be more credible that a person not injured on a job would take a layoff and have the injury treated without seeking workers compensation benefits. The ALJ held:

The respondent's version of the facts is more believable in this case. It is held that the claimant did not injure his low back in the December 29, 2003 incident. It appeared the claimant had back trouble pre-existing this incident. It is held that the claimant did not report the accident until July, 2004, which would not be timely according to K.S.A. 44-520. The respondent did file an accident report within 28 days after it had knowledge of the alleged work accident, so the time limit for written claim was not extended, and the claimant's written claim was not timely according to K.S.A. 44-520a.¹

This case turns on the credibility of the witnesses. Generally, the Board will give some deference to the ALJ's determination of credibility where, as in this case, except for Mr. Folk, the ALJ had the opportunity to observe the witnesses testify in person. After reviewing the testimony and exhibits, the Board is persuaded that the ALJ's findings and conclusions should be affirmed. Although the inconsistencies between claimant, claimant's brother and Mr. Lord's version of events versus Mr. Emery's testimony is troubling, at this point in the proceedings and based upon the record presented, the Board finds that by the

¹ALJ Order (Aug. 15, 2005) at 2-3.

barest of margins, claimant has failed to meet his burden of proving he gave notice of his accident and injury as alleged and that his current need for treatment is due to the December 29, 2003 accident.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated August 15, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2005.

BOARD MEMBER

c: Leigh C. Hudson, Attorney for Claimant
Clinton D. Collier, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director